

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ETHAN H.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2012020289

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on March 21, 2012, in Pomona, California. Ethan H. (Claimant) was represented by his parents and authorized representatives, Joseph and Rachel H.¹ San Gabriel Pomona Regional Center (Service Agency or SGPRC) was represented by its Fair Hearing Program Manager, Daniela Martinez.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on March 21, 2012.

ISSUE

The sole issue to be decided is as follows:

¹ Claimant's and his parents' surnames are omitted throughout this Decision to protect their privacy.

Should SGPRC be required to fund intensive Applied Behavior Analysis (ABA) services for Claimant?

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FACTUAL FINDINGS

1. Claimant is a 3-years, 8-months old (date of birth 8/21/08) male client of the Service Agency who lives with his parents. He has been diagnosed with Moderate Mental Retardation. (Exhibits 1 and 2.)

2. Claimant is non-verbal and immobile. He is not potty trained and requires assistance for all self-care needs. As noted in his August 2011 Individual Program Plan (IPP), Claimant's parents became concerned about his behaviors which included random tantrums, screaming, pulling hair, spitting, kicking, scratching others, poking people's eyes, banging his head on nearby objects, flapping his arms and legs when he gets excited, and throwing objects on the floor. (Exhibit 2; Testimonies of Joseph H. and Daniela Martinez.)

3. Some of the goals stated in Claimant's 2011 IPP were for Claimant to decrease his tantrums, to become more compliant, and to stop pulling hair and banging his head. To progress toward those goals, Claimant's parents agreed to attend a behavior workshop at the regional center and follow up with techniques and recommendations obtained at the workshop. The Service Agency agreed that, if no generic resource was available, it would fund behavior intervention according to the Service Agency's funding policy. (Exhibit 2.)

4. Following the 2011 IPP, Claimant's mother attended several behavior workshops at SGPRC. During those workshops, she learned about intensive ABA services, which she understood involved the provision of 25 to 40 hours per week of services which were different from "non-intensive" ABA

services. Claimant's mother observed the actual provision of intensive ABA services to a child for several hours. Based on Claimant's mother's observations, Claimant's parents determined that Claimant needed intensive ABA services.

(Testimonies of Joseph H. and Rachel H.)

5. Claimant's parents requested that he be provided intensive ABA services. (Testimonies of Joseph H., Rachel H., and Daniela Martinez.)

6(a). On September 28, 2011, SGPRC sent Claimant a Notice of Proposed Action (NOPA), denying his request for funding of intensive ABA services. The stated reasons for the proposed action were:

[Claimant's] needs are currently being met through his current IEP and IPP objectives and services. You have stated [Claimant] tantrums by spitting, kicking, banging head onto object near by, scratches and pulls mom's hair. You also mentioned that tantrums tend to last 1 to 5 minutes and vary in occurrence. Regional Center has offered Behavior Intervention services to address behavior concerns, which you have accepted; however, you stated that you would also like to explore intensive ABA services. According to Purchase of Service Policy, "When intensive behavior services are being considered for a young child, many factors must be considered. Upon decision by the IFSP/IPP team, along with recommendation from the Autism Consultation Committee, all of the following conditions shall be met: 1. Diagnosis of Autism is suspected or has been confirmed by regional center.

2. The child is under the age of 66 months. 3. The child's needs cannot be met through less intensive services. 4. Parents and/or primary caregivers have completed group instruction on the basics of behavior intervention. Depending on individual family needs, additional hours of respite to attend the initial behavioral strategies training may be utilized.

[¶] . . . [¶]

The request for Intensive ABA services has been reviewed and at this time [Claimant] does not meet the criteria to receive intensive services. (Exhibit 1.)

6(b). Claimant filed a Fair Hearing Request. (Testimonies of Joseph H. and Daniela Martinez.)

7(a). On December 2, 2011, Behavior Specialist, Henry Wong (Mr. Wong), under the supervision of Licensed Psychologist, Alit Redjaian, Psy. D., with Howard J. Chudler and Associates, Inc. (Chudler), conducted an evaluation of Claimant to address his tantrums and resistive behavior. The evaluator noted:

Tantrum episodes were determined to be the main concern for the purpose of this evaluation. This behavior is manifested by kicking, lying and tapping on the floor, crying, screaming, pulling others' hair, banging his head, and throwing item(s).

This behavior has been ongoing; however it was reported to have been slowly decreasing in frequency.

Baseline of tantrum reportedly occurs about 16-18 times per day ranging from mild (crying and yelling) to severe (kicking, hitting, and banging head) ones.

Antecedents reportedly include when [Claimant] is thwarted and not getting his way, during transitions, his wants and needs are not immediately met, being bored, and sitting on high chair for extended time.

In terms of consequences, Parents reported to ignore him briefly and pick him up or sit him on the floor to play.

This behavior reportedly occurs at home and at school. The function of the behavior appears to be attention seeking, as well as communication of displeasure and disapproval.(Exhibit 3.)

7(b). Chudler recommended four months of services at a rate of 12 hours per month.

8. After the evaluation, Claimant's father spoke with Mr. Wong, and Mr. Wong agreed to recommend an increase of service hours to a maximum of 20 hours per month. However, Claimant's parents understood that Chudler does not provide intensive ABA services. Moreover, Claimant's parents did not believe the 20 hour recommendation was adequate, since it was still not a provision of intensive ABA. (Testimonies of Joseph H. and Rachel H.)

9. Nevertheless, as of the date of the fair hearing, Mr. Wong had come to Claimant's home twice in the preceding 10 days and had begun working with Claimant. (Testimony of Joseph H.)

10(a). At the fair hearing, the Service Agency maintained that the denial of intensive ABA services was appropriate. According to the Service Agency's Purchase of Service Policy, intensive ABA services are typically used for children with a diagnosis of autism whose needs cannot be met through less intensive services. However, some exceptions are made. Nevertheless, the Service Agency noted that the assessment conducted by Chudler had recommended only 12 hours per month of ABA services. (Exhibit 5; Testimony of Daniela Martinez.)

10(b). The Service Agency is not opposed to funding another full assessment and/or intensive ABA services if the services provided by Chudler are not effective after a six month trial. (Testimony of Daniela Martinez.)

11. Claimant's parents "have [their] heart set on intensive ABA" being provided from the outset. According to Claimant's father, they are "not [contending] that non-intensive ABA will not be helpful, but that intensive ABA will truly help to correct [Claimant's] behavior sooner." They believe that they have a small "window of opportunity," and that once Claimant passes a certain age, the services are "not going to work."

12. There was no evidence of any behavior assessment conducted wherein the evaluator recommended intensive ABA services for Claimant.

LEGAL CONCLUSIONS

1. Cause exists to deny Claimant's appeal of the Service Agency's denial of funding for intensive ABA services. (Factual Findings 1 through 12.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code,

§§ 115 and 500.) In seeking funding of intensive ABA services, Claimant bears the burden of proving by a preponderance of the evidence that the change in services is necessary. Claimant has not met his burden of proof.

3. Pursuant to the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act), the Service Agency is required to secure services and supports that: meet the individual needs and preferences of consumers (Welf. & Inst. Code, §§ 4501 and 4646, subdivision (a).); support their integration into the mainstream life of the community (Welf. & Inst. Code, §§ 4501 and 4646, subdivision (a).); “foster the developmental potential of the person” (Welf. & Inst. Code, § 4502, subdivision (a).); and “maximize opportunities and choices for living, working, learning and recreating in the community” (Welf. & Inst. Code, § 4640.7, subdivision (a).).

4. Welfare and Institutions Code section 4512, subdivision (b) provides, in part:

[T]he determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.

5. Welfare and Institutions Code section 4646, subdivision (a) provides, in part:

[I]t is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

6. Welfare and Institutions Code section 4646.5 provides, in part:

(a) The planning process for the individual program plan described in Section 4646 shall include all of the following:

[¶] . . . [¶]

(2) A statement of goals, based on the needs, preferences, and life choices of the individual with developmental disabilities, and a statement of specific, time-limited objectives for implementing the person's goals and addressing his or her needs. These objectives shall be stated in terms that allow measurement of progress or monitoring of service delivery. These goals and objectives should maximize opportunities for the consumer to develop relationships, be part of community life in the areas of community participation, housing, work, school, and leisure, increase control over his or her life, acquire increasingly positive roles in community life, and develop competencies to help accomplish these goals

[¶] . . . [¶]

- (4) A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services. (Emphasis added.)

7. Welfare and Institutions Code section 4648, subdivision (a)(1), provides:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to

live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

[¶] . . . [¶]

(7) No service or support . . . shall be continued unless the consumer or, where appropriate, his or her parents . . . is satisfied and the regional center and the consumer or, when appropriate, the person's parents . . . agree that planned services and supports have been provided, and reasonable progress toward objectives have been made."

8. Pursuant to the Lanterman Act, an IPP must include a statement of the consumer's goals and objectives, based on the consumer's needs and preferences. Services provided a consumer must be effective in meeting the consumer's IPP goals, and there must be reasonable progress toward objectives.

9. The evidence did not establish that intensive ABA services (as opposed to the currently provided non-intensive ABA services) are necessary to meet Claimant's IPP goals and objectives. Neither the Chudler assessment nor the totality of the evidence supports a finding that funding of intensive ABA services is warranted at this time. There were no reasons given by any behavior specialist regarding why intensive ABA services are necessary to meet Claimant's goals. Consequently, Claimant did not prove by a preponderance of the evidence that the Service Agency should be required to fund intensive ABA services at this time.

10. Nevertheless, a review should be conducted after Claimant has received several months of services from Chudler, in order to determine whether

the services have made reasonable progress toward Claimant's IPP objectives. At that time, the provision of intensive ABA services should be revisited.

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ORDER

1. SGPRC's denial of funding for intensive ABA services is upheld. Claimant's appeal is denied.

2. In August 2012, as part of Claimant's annual IPP meeting, a review shall be conducted to determine whether the ABA services provided by Chudler have made reasonable progress toward Claimant's IPP goals and objectives. If there has been insufficient progress toward Claimant's IPP goals and objectives, the provision of intensive ABA services should be reconsidered.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: April 26, 2012

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings